LIBRARY
SUPREME COURT, U. S.

No. 953

Supreme Court, U.S.
FILED
NOV 9 1970
ROBERT SEAVER, CLERK

# Supreme Court of the United States

**October Term, 1970**

---

In the Matter of

Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.

DANIEL RICHARD D.,

*Appellant,*

v.

COUNTY OF ONONDAGA,

*Appellee.*

---

**On Appeal From The State Of New York Court of Appeals**

## JURISDICTIONAL STATEMENT

MACKENZIE, SMITH, LEWIS, MICHELL & HUGHES
*Attorneys for Appellant*
Office and Post Office Address
600 Onondaga Co. Sav. Bank Bldg.
Syracuse, New York 13202

October, 1970.

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

## TABLE OF CONTENTS


Page

Opinion Below ..... 1

Jurisdiction ..... 2

Statutes Involved ..... 3

Questions Presented ..... 3

Statement ..... 4

The Questions Are Substantial ..... 6

Appendix A:

Remittitur, 7-2-70 ..... 1a

Opinion of Scileppi, J. ..... 3a

Opinion of Fuld, Ch. J. (Dissenting) and Breitel, J. (Dissenting in part) ..... 11a

Opinion of Gabrielli, J. ..... 14a

Opinion of Henry, J. (dissenting) ..... 23a

Decision of Barth, J., 3-10-69 ..... 25a

Decision of Barth, J., 3-11-69 ..... 30a

Appendix B:

Affidavit of Ronald J. Crowley ..... 33a

Affidavit of Dennis G. O'Hara ..... 35a

Page

## CITATIONS

**Cases:**

*Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389 ..... 8

*Baldwin* v. *New York*, 398 U. S. ——, 90 S. Ct. 1886 .. 7

*Duncan* v. *State of Louisiana*, 391 U. S. 145 ..... 7

*In re Gault*, 387 U. S. 1 ..... 5, 7

*In re Winship*, 397 U. S. 358 ..... 4, 5, 6, 7, 8

*Jackson* v. *Denno*, 24 N. Y. 2d 168 ..... 9

*Johnson* v. *Florida*, 391 U. S. 596 ..... 3

*Johnson* v. *New Jersey*, 384 U. S. 719 ..... 8

*Johnson* v. *Zerbst*, 304 U. S. 458 ..... 8

*Linkletter* v. *Walker*, 381 U. S. 618 ..... 8

*McCarthy* v. *United States*, 394 U. S. 459 ..... 8

*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 ..... 8

*People* v. *Brown*, 24 N. Y. 2d 168 ..... 9

*People* v. *Chirieleison*, 3 N. Y. 2d 170 ..... 8

*People* v. *Nixon*, 21 N. Y. 2d 338 ..... 8

*People* v. *Prosser*, 309 N. Y. 353 ..... 8

*Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U. S. 32 ..... 3

*Tehan* v. *United States*, 382 U. S. 406 ..... 8

*United States* v. *Cavell*, 254 F. Supp. 154 ..... 9

*United States* v. *Rundle*, 268 F. Supp. 691 ..... 9

Page

**Statutes:**

Article 7 of New York Family Court Act ..... 2, 3

Title 28, U. S. Code, Sec. 1257 (2) ..... 2

Rule 13 (1) of the Rules of the Supreme Court of United States ..... 2

Rule 34 (2) of the Rules of the Supreme Court of United States ..... 3

New York Family Court Act, Section 752 ..... 3, 7

New York Family Court Act, Section 744 (b) ..... 3, 4

New York Penal Law, Section 125.25 ..... 4

New York Penal Law, Section 120.25 ..... 5

Constitution of the United States, Amendment VI .... 6

Constitution of the United States, Amendment XIV, Section 1 ..... 7, 8

New York Family Court Act, Section 753 ..... 7

New York Family Court Act, Section 758 ..... 7

Code of Criminal Procedure, Section 517 ..... 8

**Miscellaneous:**

Vol. 29A, McKinney's Consolidated Laws of New York, page 321 ..... 3

Vol. 29A, McKinney's Consolidated Laws of New York, 1970 Pamphlet, page 104 ..... 3

# Supreme Court of the United States

**October Term, 1970**

---

In the Matter of

Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.

DANIEL RICHARD D.,

*Appellant,*

v.

COUNTY OF ONONDAGA,

*Appellee.*

---

**On Appeal From The State Of New York Court of Appeals**

---

## JURISDICTIONAL STATEMENT

---

Appellant's appeal from an Order and Judgment of the State of New York Court of Appeals, entered on July 2, 1970, reversing an Order of the Appellate Division of the Supreme Court, Fourth Department, and reinstating an Order of Commitment of Family Court, Onondaga County, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial constitutional questions are presented.

## OPINION BELOW

The Opinion of the State of New York, Court of Appeals, is reported in 27 N. Y. 2d 90; 313 N. Y. S. 2d 704. The Opinion of the Appellate Division of the Supreme Court,

Fourth Department, is reported in 34 A. D. 2d 41; 310 N.Y.S. 2d 82. Copies of both Opinions and of the Remittur of the State of New York Court of Appeals, dated July 2, 1970, are attached hereto as Appendix A.

## JURISDICTION

This proceeding was commenced under Article 7 of the New York Family Court Act with the filing of a petition in Family Court, Onondaga County, alleging that the appellant was a juvenile delinquent on January 29, 1969. The Judgment of the State of New York Court of Appeals sought to be reversed was dated and entered July 2, 1970, and a Notice of Appeal to the Supreme Court of the United States was filed with the Clerk of the State of New York Court of Appeals on July 20, 1970.

The jurisdiction of the Supreme Court to review this Decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The affidavits of counsel, which are annexed hereto as Appendix B, demonstrate that this appeal was not timely docketed by appellant in accordance with Rule 13(1) of the Rules of the Supreme Court of the United States, and that this failure was occasioned by an honest and inadvertent mistake by both counsel as to the applicable rules of this Court. The failure to timely docket said appeal was further aggravated by counsel for the appellant's attention to his motion for a new dispositional hearing in Family Court, Onondaga County, which motion is, as yet, undecided by said Court. It is respectfully submitted that the interests of the appellee, County of Onondaga, have not in any way been injured as a result of the omission of counsel for the appellant and that, in fact, the appellee, by its counsel, concurs in appellant's requests to forgive the tardiness in docketing said case and to allow a hearing on the merits of the constitutional questions raised by the infant appellant.

A motion to extend the time for docketing the case pursuant to Rule 13(1) of the Rules of this court was not made

since counsel's error was not discovered until October 24, 1970, some 22 days after the period had expired and said motion would not have been permitted under Rule 34(2) of the Rules of this court.

The following decisions support the authority of this court to forgive the error of counsel in not timely docketing this appeal after the same was commenced by the timely filing of a Notice of Appeal: Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32; Johnson v. Florida, 391 U.S. 596.

## STATUTES INVOLVED

> If the allegations of a petition under this article are established in accord with part three, the court shall enter an order finding that the respondent is a juvenile delinquent or a person in need of supervision and shall state the grounds for the finding. New York Family Court Act, Section 752; Vol. 29A, McKinney's Consolidated Laws of New York, p. 321.
>
> Any determination at the conclusion of an adjudicatory hearing that a respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroberated confession made out of court by a respondent is not sufficient. New York Family Court Act, Section 744(b); Vol. 29A, McKinney's Consolidated Laws of New York, 1970 Pamphlet, p. 104.

## QUESTIONS PRESENTED

Does a person who is alleged to be a juvenile delinquent under Article 7 of the New York Family Court Act have a constitutional right to a jury determination as to the truth or falsity of the allegations contained in the petition?

Where an alleged juvenile delinquent enters a plea of guilty to the allegations of a substituted petition after his

requests for a jury trial have been denied, does he thereby waive his right to appeal on the issue of a jury trial?

Should this Court's holding in the case of In re Winship, 397 U. S. 358, be applied to an alleged juvenile delinquent whose case was on direct appeal on the issue of the proper burden of proof at the time said case was decided?

Is an alleged juvenile delinquent entitled to a separate pre-trial hearing on the issue of the voluntariness of an alleged confession?

## STATEMENT

On January 29, 1969, the appellant, who was then a fifteen (15) year old youth, was charged in Family Court, Onondaga County, with being a juvenile delinquent in that he committed an act which, if committed by an adult, would constitute the crime of murder in violation of New York Penal Law, Section 125.25. He thereafter appeared by counsel, denied the allegations of the petition and, by way of both oral and written motions, requested that there be a trial by jury on the allegations contained in the petition (*R. 51, 61-71, 120-123), that there be a pre-trial hearing to determine the voluntariness of any alleged confession or admissions by the appellant (R. 19-21, 115), and that the necessary burden of proof on the allegations contained in this petition be by proof beyond a reasonable doubt (R. 19-21, 115).

Each of the aforesaid motions was denied by the Judge of Family Court in two separate Opinions (R. 31-37), copies of which are attached hereto in Appendix A. These Opinions were handed down on March 10, 1969. On March 13, 1969, the appellant requested a stay of the proceedings so that the constitutionality of New York Family Court Act, Section 744-b could be tested before a three-judge panel in Federal District Court (R. 120-125). Said motion was denied and the appellant was ordered to proceed to an immediate trial on the allegations contained in the petition (R. 125).

---

* References are to pages in the Record before the State of New York Court of Appeals.

After a recess in the proceedings and discussion between counsel, the County Attorney moved that a new petition be substituted which charged the appellant with committing an act which, if committed by an adult, would constitute the crime of reckless endangerment in violation of New York Penal Law, Section 120.25. The allegations of the new petition were admitted by appellant and the original petition was dismissed.

Thereafter on April 3, 1969, the appellant was committed to the New York State Agricultural and Industrial School for an indefinite period not to exceed three (3) years (R. 283). A Notice of Appeal to the Appellate Division of the Supreme Court, Fourth Department, was filed on April 22, 1969 (R. 1). That court by a written decision (R. 312-321), Henry, J., dissenting (R. 322-323), reversed the Family Court and held that due process requires that an alleged juvenile delinquent be given the right to a jury determination as to his guilt or innocence and, further, that the County Attorney was required to prove an act of juvenile delinquency by proof beyond a reasonable doubt. The matter was remitted to Family Court, Onondaga County by an order of the Appellate Division, dated April 9, 1970 (R. 310-311). The appellee filed a Notice of Appeal to the State of New York Court of Appeals on April 17, 1970. The matter was argued before the Court of Appeals, and in a 4-3 decision dated July 2, 1970, that court reversed the Appellate Division and reinstated the Order of Family Court.

The Court of Appeals, two judges dissenting, held that the due process clause of the Fourteenth Amendment does not require a jury trial in juvenile delinquency proceedings. The majority decided that it was constitutionally permissible to draw a distinction between adults and juveniles for the purpose of a jury trial and that to afford this right to juveniles would make delinquency adjudications unwieldy and disruptive. The dissenting justices were of the opinion that recent decisions of this Court (In Re Gault, 387 U.S. 1; In Re Winship, 397 U.S. 358) make it clear that a child

charged with juvenile delinquency is entitled to a trial by jury if the period for which he may be confined or incarcerated exceeds six (6) months.

On the issue of the required burden of proof, the Court of Appeals, three justices dissenting, held that since In Re Winship was not decided by this Supreme Court at the time that the present proceeding was commenced, its application became a question of retroactivity. The court refused to apply the rule of In Re Winship to this case since to do so would substantially effect countless juvenile delinquency adjudications made on the prior standard. The dissenting justices felt that retroactivity should be extended at least to cases on direct appeal, as was the case here.

The majority further held, three justices dissenting, that the appellant's admission to the allegations of the substituted petition constituted a waiver and abandonment of all his rights of appeal. Justice Breitel, in a separate dissent on this issue, recognized that the appellant's plea to the allegations of the substituted petition was made to avoid an admission of patricide, with all of its civil consequences. He felt that the court should not imply an abandonment of appellant's rights merely because he chose not to stand trial on a lesser standard after he had asserted his right to a trial based on proof beyond a reasonable doubt.

Finally, the majority held that, absent a jury trial, the issue of the voluntariness of any admission or confession is determinable by the same judge who presides at the trial. The dissention opinions did not address themselves to this issue.

## THE QUESTIONS ARE SUBSTANTIAL

1. The Federal Constitution guarantees the right to trial by an impartial jury in all criminal prosecutions. Constitution of the United States, Amendment VI. The Constitution further guarantees that no person shall be deprived of life, liberty or property without due process of law.

Constitution of the United States, Amendment XIV, Section 1. Section 752 of the New York Family Court Act provides that the Court, without a jury, is to make the determination as to whether a child is a Juvenile Delinquent. It is respectfully contended that the denial of the infant appellant's repeated demands for a jury trial on the truth or falsity of the allegations contained in the petition constituted an abuse of basic due process.

There is no question than an adult who stands accused of a serious crime is guaranteed the right to a jury trial by the due process mandate of the Fourteenth Amendment. Duncan v. State of Louisiana, 391 U.S. 145. The Court of Appeals, however, drew a distinction between adults and juveniles for purposes of a jury trial in denying the same to appellant. This attempt to withhold a federally protected right from a juvenile on the theory that such proceedings are not criminal in nature and that to provide a jury trial would have an adverse effect on the concept of juvenile courts is in direct conflict with the rulings of this court. In Re Gault, 387 U.S. 1; In Re Winship, 397 U.S. 358.

The maximum possible incarceration which may be ordered upon an adjudication of juvenile delinquency is three (3) years (New York Family Court Act, Section 753, 758). The order appealed from committed the appellant for the maximum three-year period. It is contended that the severity of this penalty makes the adjudication of juvenile delinquency serious, within the context of the Duncan case, and subjects the trial to the mandates of the Sixth Amendment. Baldwin v. New York, 398 U.S. ____, 90 S. Ct. 1886.

Given a possible incarceration in excess of six (6) months, the due process clause requires that there be a right to a trial by jury at the adjudicatory stage of the proceedings and no amount of civil labels or good intentions can justify depriving a child of this Sixth Amendment right.

2. This court has already held that an adjudication of

juvenile delinquency must be based on proof beyond a reasonable doubt. In Re Winship, 397 U.S. 358. From the very outset of these proceedings the appellant insisted that due process required this stricter standard of proof, and this contention was preserved on all appeals. It is respectfully contended that this burden of proof goes directly to the integrity of the fact finding process and that the rule of Winship should, therefore, be given retroactive application. Linkletter v. Walker, 381 U.S. 618; Tehan v. United States, 382 U.S. 406; Johnson v. New Jersey, 384 U.S. 719. This is particularly true in those cases where the question has been preserved in matters on direct appeal at the time of this court's decision in Winship.

3. A waiver is ordinarily an intentional relinquishment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458; McCarthy v. United States, 394 U.S. 459. The courts will usually indulge every reasonable presumption against the waiver of fundamental constitutional rights and do not presume acquiescence in the loss of said rights. Aetna Ins. Co. v. Kennedy, 301 U.S. 389; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292.

The majority opinion in the Court of Appeals, to the effect that appellant relinquished all right of appeal by virtue of his admission to the allegations of the substituted petition, raises substantial questions under the Equal Protection Clause of the XIV Amendment to the Federal Constitution. This is so since, under New York Law, an adult has an unquestioned right to appeal from a judgment of conviction rendered on a plea of guilty. People v. Nixon, 21 N.Y.2d 338; People v. Chirieleison, 3 N.Y.2d 170; People v. Prosser, 309 N.Y. 353; Code of Criminal Procedure, Section 517. It is difficult to perceive how one can constitutionally distinguish between adults and juveniles in so far as their rights of appeal are concerned.

It should also be noted that the infant appellant's admission came only after he was denied the right to a jury trial, was denied the right to a separate pretrial hearing on the

voluntariness of an alleged confession and was advised that the standard of guilt would be by a fair preponderance of the evidence, all of which constituted an effective denial of basic due process.

4. The majority opinion in the Court of Appeals held that it was permissible for the voluntariness of an alleged confession to be determined by the same judge who presided at the fact-finding hearing and that a separate pretrial hearing was not constitutionally required. This holding was in accord with that Court's prior decision in People v. Brown, 24 N.Y.2d 168.

The appellant contends that the rationale of Jackson v. Denno, 378 U.S. 368 requires a separate hearing on the voluntariness of an alleged confession by a judge other than the trial judge in any non-jury case. This contention is predicated on the belief that it is fundamentally unfair to allow the same judge who ultimately passes on the guilt or innocence of the juvenile to simultaneously determine the issue of voluntariness of an alleged confession made by that juvenile. There is support for this position in recent Federal District Court decisions. United States v. Cavell, 254 F. Supp. 154; United States v. Rundle, 268 F. Supp. 691.

It is submitted that the decision of the Court of Appeals effectively deprives the infant-appellant of the basic constitutional rights of a trial by jury, freedom from self-incrimination and the requirement of adjudication on proof beyond a reasonable doubt. We believe that the constitutional questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

MACKENZIE, SMITH, LEWIS,
MICHELL & HUGHES
*Attorneys for Appellant*
Office and Post Office Address
600 Onondaga Co. Sav. Bank Bldg.
Syracuse, New York 13202

VERNER R. LOVE, JR.,
*Of Counsel.*

October, 1970.

# APPENDIX A

# REMITTITUR, 7-2-70.

No. 267

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and seventy, before the Judges of said Court.

WITNESS, The HON, STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 2, 1970.

---

4 No. 267 70

In the Matter of Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.
County of Onondaga,

Appellant,

Daniel Richard D.,

Respondent.

---

BE IT REMEMBERED, That on the 28th day of May in the year of our Lord one thousand nine hundred and seventy, County of Onondaga, the appellant-in this cause, came here unto the Court of Appeals, by Eli Gingold, its attorney-, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Daniel Richard D., the respondent- in said cause, afterwards appeared in said Court of Appeals by Mackenzie, Smith, Lewis, Michell & Hughes, his attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

Remittitur, 7-2-70.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Hugh C. Gregg, II. of counsel for the appellant -, and by Mr. Dennis G. O'Hara of counsel for the respondent -, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is reversed and the order of the Family Court, Onondaga County, reinstated. Question certified answered in the negative.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Family Court, Onondaga County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed & c. Question certified answered in the negative, as aforesaid.

And hereupon, as well the thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Family Court, Onondaga County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Family Court, before Judges thereof, & c.

RAYMOND H. CANNON
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, )
Albany, July 2, 1970. )

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL) RAYMOND J. CANNON
Clerk.

## OPINION OF SCILEPPI, J.

STATE OF NEW YORK
COURT OF APPEALS

4. No. 267 70

In the Matter of Daniel Richard D., a Person Alleged to be a Juvenile Delinquent.
County of Onondaga,

Appellant,

Daniel Richard D.,

Respondent.

SCILEPPI, J.:

This is an appeal, taken by the County of Onondaga from an order of the Appellate Division, Fourth Department, which reversed an order of the Family Court, Onondaga County, adjudicating Daniel Richard D. to be a juvenile delinquent and remitting the matter to the Family Court for further proceedings.

On January 24, 1969 Daniel Richard D., the respondent herein, was taken into custody in connection with an investigation of the death of his father. The Family Court thereafter determined, pursuant to Section 728 of the Family Court Act, that it had jurisdiction over the matter and a petition was filed on January 29, 1969 which charged respondent with being a juvenile delinquent alleging that he had shot and killed his father with a shotgun, acts which if committed by an adult would constitute the crime of murder (Penal Law §125.25). Counsel was retained, the charge was denied and motions were made requesting a jury trial, orders requiring the County Attorney to prove his case beyond a reasonable doubt, service of notice under section 813-f of the Code of Criminal Procedure of his intention, if any, to introduce into evidence a confession or admission of respondent and for a Huntley hearing. These motions were denied, and March 13, 1969 was designated for

a "fact-finding hearing" under section 744 of the Family Court Act. At this time counsel renewed the aforesaid motions which were again denied, and an off-the-record conference among counsel for the respondent, members of the County Attorney's office and the court then ensued. As a result of this conference, the County Attorney offered to file a new petition alleging that respondent had committed an act which, if done by an adult, would constitute the crime of reckless endangerment in the first degree (Penal Law §120.25). He added that "[i]t is further our recommendation that upon the appropriate arraignment of this Court and upon Respondent being represented by counsel and by being properly advised by the Court if he admits the allegations of the new petition that at that time I would move for dismissal of the old petition". The court immediately conducted an inquiry, respondent admitted the allegations of the new petition and the old petition was dismissed. Thereafter on April 3, 1969, a "dispositional hearing" was held pursuant to sections 743, 745 and 746 of the Family Court Act and respondent was committed to the New York State Agricultural and Industrial School for an indefinite period not to exceed three years (Family Ct. Act, §§753, 758). On appeal to the Appellate Division, the determination of the Family Court was reversed and the matter remanded for further proceedings. The majority took the view that respondent was entitled to a jury trial on the question of his delinquency and that the Supreme Court's recent enunciation of the requirement of proof beyond a reasonable doubt in juvenile delinquency proceedings (In re Winship, 397 U.S. 358) should be applied retroactively. It further held that respondent was entitled to these rights, notwithstanding the fact that he had admitted all of the allegations of the second petition.

The County Attorney has appealed to our court pursuant to the certified question whether the Appellate Division order was properly made. In support of his position that a reversal is mandated, he argues that it is constitutionally

permissible for us to draw a distinction between adults and juveniles under 16 years of age for the purpose of a jury trial. We agree. While it is, of course, true that a finding of juvenile delinquency, which will subject a juvenile to commitment for up to three years, may render the charge serious under Duncan v. Louisiana (391 U.S. 145) and Baldwin v. New York (398 U.S.___, 38 U.S. Law Week 4554), it is our opinion that the distinction, suggested by appellant, is not only proper, but necessary. In Kent v. United States (383 U.S. 541, 562) the Supreme Court expressed its view that it did "not mean *** to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but *** that the hearing must measure up to the essentials of due process and fair treatment." It was in Matter of Gault (387 U.S. 1, 10) that the court defined its meaning of fairness to include (1) notice the self-incrimination; (4) right to confrontation and cross-examination; (5) right to a transcript of the proceedings; and (6) right to appellate review. The Court in Gault did not express an opinion on other due process requirements; concluding that due process does have a role to play and that "[t]he problem is to ascertain the precise impact of the due process requisite upon such proceedings" (Gault, supra at 13-14). Thus after Gault, it became apparent that the Supreme Court would resort to a case-by-case approach so as to determine what due process rights would obtain at a juvenile delinquency fact-finding hearing. It was in accordance with this approach that the "reasonable doubt" quantum of proof was recently added to the list ( In re Winship, supra). Mr. Justice Brennan, writing for the court, adhered to the Court's view expressed in Kent and Gault that all due process elements were not required and that the sole issue before the court was the necessary quantum of proof. Implicit in the opinion of the Court is the view that Winship would not be a death knell to our Family Court because the use of the reasonable doubt

standard would not displace any of the benefits of the juvenile process or inhibit the functioning of the system. This point was amplified by Mr. Justice Harlan in his concurring opinion. He wrote:

> "In this regard, I think it worth emphasizing that the requirement of proof beyond a reasonable doubt that a juvenile committed a criminal act before he is found to be a delinquent does not (1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a 'criminal' because he has been found to be a delinquent, or (3) burden the juvenile courts with a procedural requirement which will make juvenile adjudications significantly more time consuming, or rigid. Today's decision simply requires a juvenile judge to be more confident in his belief that the youth did the act with which he has been charged." (In re Winship, supra at p. 375; emphasis added).

We agree with Justice Harlan and a consideration of Kent, Gault and Winship leads us to conclude that trial by jury, in cases involving juvenile deliquents is neither constitutionally required nor desirable. To require a jury trial in such proceedings "would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge'" (President's Commission on Law Enforcement and the Administration of Justice: Task Force Report on Juvenile Delinquency and Youth Crime, pp. 38-40 [1967]; See Duncan, supra at p. 158). Moreover, it would make delinquency adjudications unwieldy and disruptive since the Family Court is not structured to handle jury trials. This view is consonant with the majority of most State courts which have passed upon the issue since Gault was decides (see In re Fucini, 44 Ill. 2d 305, appeal to the

Supreme Court filed April 6, 1970, 38 U.S. Law Week 3398; Dryden v. Kentucky, 435 S.W. 2d 457; In re Johnson, 254 Md. 517; In re Burrus, 275 N.C. 517; In re Agler, 19 Ohio St. 2d 70; In re McKeiver, 255 A. 2d 921, affd. 265 A. 2d 350 [Pa.], probable jurisdiction noted June 29, 1970, _____ U.S. _____, 38 U.S. Law Week 3522; State v. Turner [Ore.], 453 P. 2d 910; In re Estes v. Hoff, 73 Wn. 2d 263; Ann. 100 ALR 2d 1241, right to Jury Trial in Juvenile Court Delinquency Proceedings; contra, Peyton v. Nord, 78 N.M. 717; see, also, DeBacker v. Brainard, 183 Neb. 461, app. dsmd. 396 U.S. 28, where the Supreme Court chose not to reach the jury issue because the juvenile delinquency adjudication anteceded Duncan v. Louisiana, 391 U.S. 145, supra).

Therefore, we see no compelling reason why we should burden the court with a procedural requirement which would make such adjudications significantly time consuming, cumbersome, and result in a loss of secrecy which has always been deemed most desirable, since a jury trial would not necessarily afford the youngster a better fact-finding process.

As to respondent's claim to section 813-f notice, suffice it to say that Family Court procedure is not governed by the Code of Criminal Procedure (see Code Crim Pro., § 11, Report of Joint Legislative Committee on Court Reorganization, 1962, Part II, p. 2; Matter of Williams, 49 Misc 2d 154). Since we conclude that a jury trial is not constitutionally required, respondent's claim to the right of a separate Huntley hearing is without merit. Absent a jury trial all questions of fact, including those dealing with the voluntariness of any statements, are determinable by the same Judge who presides at the trial (People v. Brown, 24 N Y 2d 168).

Turning to respondent's argument that he was entitled to the reasonable doubt quantum of proof, it becomes significant that at the time the proceeding below was commenced

(March 1969), no such right existed. Since Winship was not decided by the Supreme Court until March 31, 1970, the question is one of retroactivity. This is still an open question, and the Supreme Court has thus far declined one opportunity to rule on the issue (see Texas v. Santana, 444 S.W. 2d 614, ___U.S.___, 38 U.S. Law Week 3405, where the court granted certiorari, vacated the judgment and remanded for further consideration in light of Winship). While the Supreme Court is not required to give retroactive application to new rules, they have in the past done so where the integrity of the fact-finding process is involved (see, e.g., Linkletter v. Walker, 381 U.S. 618, 639; Tehan v. Shott, 382 U.S. 406, 416; Johnson v. New Jersey, 384 U.S. 719, 726). The court has recently departed from this policy in DeStefano v. Woods (392 U.S. 631) where it refused to give retroactive effect to Duncan v. Louisiana (supra). We hold that Winship should not be given retroactive effect since retroactive application of the reasonable doubt rule would substantially affect countless juvenile delinquency adjudications made on the prior standard.

Moreover, a reversal is mandated on the further ground that respondent's voluntary and intelligent admission, by pleading guilty to the allegations of the second petition, accomplished an effective waiver and abandonment of all of the arguments urged on this appeal. The majority in the Appellate Division held that a 15 year old lacked capacity to waive or bargain away any of his rights; however, Justice Henry, in dissent, took a different view:

> "The court received the new petition. It was read to appellant. The court then stated to appellant and his attorney 'you can admit or deny the petition.' Appellant's attorney said, 'He admits the petition'. The court asked appellant, 'Do you admit the allegations of the petition?' and appellant answered, 'Yes, your Honor'. The record shows,

and appellant does not claim otherwise, that appellant's answer to the new petition was voluntarily and understandingly made. He did not then, nor does he now, ask to withdraw or change his answer admitting the allegations. The order appealed from committed appellant to the New York State Agricultural and Industrial School at Industry for an indefinite period not to exceed three years.

"The original petition charged acts which if committed by an adult would constitute a Class A felony (Penal Law §125.25). Upon an adjudication thereunder commitment could be to Elmira Reception Center (Family Ct. Act., § 758, subd. [b]), whereas under the new petition appellant could not be so committed. Appellant's admission of the allegations of the new petition and his commitment should be sustained on the ground that it was sought by him [the off-the-record conference was requested by his attorney] and freely taken as part of a bargain which was struck for his benefit." (34 A D 2d 49).

We agree with Justice Henry, as there is no cogent reason why a 15-year-old, represented by counsel, cannot admit the allegations of a petition against him. While this appears to be a question of first impression in this court, such a practice is not, in our opinion, offensive to any of our notions of fairness and public policy.[1/] In the case before us, there was no objection to the new petition and it is clear that respondent's admission was freely and intelligently made. Numerous motions addressed to the original petition had been made and when they were denied,

1/ Under section 2186 of the former Penal Law there was specific statutory authority permitting a 15-year-old, charged with a crime punishable by death or life imprisonment, to plead guilty to a lesser offense. This section was not continued into the current Penal Law which exempts those under 16 from criminal responsibility (§30.00) and defers these matters to juvenile delinquency proceedings in the Family Court.

respondent's attorney found it in the best interest of his client, after conferring with respondent and his family, to seek a new petition charging a lesser offense (see People v. Foster, 19 N Y 2d 150).

Since the admission to the allegations of the new petition was free from infirmity, the next question for our consideration deals with its effect. We believe that an admission to a juvenile delinquency petition should have the same force and effect as a plea of guilty to a criminal charge in a criminal case. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment" (Boykin v. Alabama, 395 U. S. 238, 242). There are grave consequences which attach to a guilty plea as it is a surrender of substantial constitutional rights, including the privilege against self incrimination, the right of confrontation and the right to a trial by jury (Boykin v. Alabama, supra, at p. 242; Brady v. United States, ___ U. S. ___, 38 U. S. Law Week 4366; McMann v. Richardson, ___ U. S. ___, 38 U.S. Law Week 4379).

Respondent in the instant case was in a position similar to the defendant in People v. Reyes (26 N Y 2d 97) where we recently said (at p. 100) that a "defendant after being informed that he has a right to a hearing [on his addiction to narcotics who] freely admits his addiction with the aid of counsel,***is in effect stating that no judicial inquiry is necessary and, therefore, it is irrelevant whether that inquiry would have been made with or without a jury".

Accordingly, the order appealed from should be reversed, the order of the Family Court, Onondaga County, reinstated and the certified question should be answered in the negative.

## OPINION OF FULD, CH. J. (Dissenting) AND BREITEL J. (Dissenting in part).

(SAME TITLE).

CHIEF JUDGE FULD (dissenting).

Thoroughly agreeing with the view expressed by the Appellate Division (34 A D 2d 41), I dissent from the decision now being made.

The 15 year old defendant before us was committed to the New York State Agricultural and Industrial School for a period not to exceed three years. In the light of recent Supreme Court decisions - particularly In re Gault (387 U.S. 1) and In re Winship (397 U.S. 358 [decided March 31, 1970]) — I find it difficult to escape the conclusion, first, that a child charged with juvenile delinquency is entitled to a trial by jury if the period for which he may be confined or incarcerated exceeds six months (see Baldwin v. New York, 398 U.S. ___, 38 U.S. Law Week 4554 [decided June 22, 1970]) and, second, that his guilt must be established beyond a reasonable doubt. (See In re Winship, 397 U.S. 358, supra.) It is quite true that juvenile delinquency proceedings are designed to save the child, rather than to punish him, and that a delinquency adjudication is not a criminal conviction. However, to cull from the court's opinion in Winship (397 U.S., at pp. 365-366), "civil labels and good intentions" may not be relied upon to deprive a child of those procedural protections and safeguards that are guaranteed to an adult.

I would, therefore, affirm the Appellate Division's order.

BREITEL, J. (dissenting in part).

I agree that not all the procedural rights afforded adults under due process are necessarily applicable to juvenile delinquency proceedings, and that jury trials are not constitutionally required for adjudication of juvenile delinquency. Unlike youthful offender adjudication, which

merely affords an alternative procedure for those subject to the criminal laws and penalties, these proceedings deal exclusively with children recognized as not criminally responsible.

On the issue of weight of the evidence, however, the United States Supreme Court's decision in In Re Winship (397 U.S. 358) is controlling. Its determination that guilt must be proven beyond a reasonable doubt, and that that standard applies in juvenile delinquency proceedings, goes directly to the integrity of the fact-finding process. Retroactivity should, therefore, be extended the Winship case, at least, as here, to cases on direct appeal.

Nor does the plea of guilty to the petition, alleging an act which if committed by an adult would constitute reckless endangerment, suggest a convincing waiver of his rights. Although respondent's treatment would be the same regardless of whether he was found guilty after trial or upon his plea to either petition, by pleading guilty he did more than avoid the unpleasantness of a trial. By his plea to facts constituting reckless endangerment he avoided the alternatives of admitting to patricide or running the risk of such a declaration. Moreover, having asserted his right to a trial based on proof beyond a reasonable doubt, his unwillingness to risk a finding of guilt based on a lesser standard should not imply abandonment of his rights. Certainly proceeding to trial could in no way further clarify the issue raised by respondent and rejected by the trial court.

Accordingly, I dissent and vote that the order appealed from be modified to limit the hearing directed by the Appellate Division to one before the court alone.

Judges Bergan, Jasen and Gibson concur with Judge Scileppi; Chief Judge Fuld dissents and votes to affirm in an opinion in which Judge Burke concurs; Judge Breitel dissents and votes to modify in a separate opinion.

Opinion of Fuld, Ch. J. (Dissenting) and Breitel, J. (Dissenting in part).

* * * * * *

Order reversed and the order of the Family Court, Onondaga County, reinstated. Question certified answered in the negative. Opinion by Scileppi, J. All concur except Fuld, Ch. J., who dissents and votes to affirm in an opinion in which Burke, J., concurs, and Breitel, J., who dissents and votes to modify in a separate opinion.

---

## OPINION OF GABRIELLI, J.

---

In the Matter of

DANIEL RICHARD D.,

a Person Alleged to be a Juvenile Delinquent,

Appellant.

---

Fourth Department, April 9, 1970.

APPEAL from an order of the Family Court (RAYMOND J. BARTH, J.), entered April 3, 1969 in Onondaga County, adjudging appellant to be a juvenile delinquent.

MACKENZIE, SMITH, LEWIS, MICHELL & HUGHES (DENNIS G. O'HARA of counsel), for appellant.

ELI GINGOLD, COUNTY ATTORNEY (HUGH C. GREGG, II, of counsel), for respondent.

GABRIELLI, J.

In a case of first impression, we are called upon to determine whether the Sixth and Fourteenth Amendments to the United States Constitution require a jury trial in a Family Court proceeding charging appellant with being a juvenile delinquent based on an act which, if committed by an adult, would constitute a felony and thus entitle him to a jury trial.

On January 29, 1969 appellant, then 15 years of age, was charged with being a juvenile delinquent in having intentionally shot and killed his father. The accusation and petition filed further charged that the described acts, "if done by an adult, would constitute the crime * * * of Murder (Violation of Section 125.25 of the Penal Law of the State of New York)".

Following his arraignment, extended argument was had upon his motion for a jury trial. This application was denied by written decision on March 10, 1969. On the following day the court, by written decision and order, also denied appellant's motion for an order to require the County

Attorney "to establish that the respondent (appellant herein) committed the acts stated in the petition" by proof beyond a reasonable doubt. The court then directed that the fact-finding hearing be commenced two days later. In the interim, appellant was denied a stay by a member of this court and, on the following day (the day set for the hearing), his application for an adjournment to obtain a Federal court review of the constitutional questions, was denied by the court below. Appellant again unsuccessfully renewed his motions for a jury trial or, in the alternative for a ruling that without a jury trial he could not be subjected to a sentence of greater than one year. A brief recess was then taken during which there was an off-the-record conference between counsel for appellant, the court and the Assistant County Attorney.

Following the conference the latter announced that if appellant would admit the allegations of a new petition charging him with an act which, if performed by an adult would be a violation of section 120.25 of the Penal Law, he would thereafter move for a dismissal of the old petition. Section 120.25 of the Penal Law provides that the crime of reckless endangerment in the first degree is committed when one engages in conduct which creates grave risk of death to another, the punishment for which is a maximum of 7 years' imprisonment, if committed by an adult. Upon his admission of this charge, appellant was subsequently adjudged a juvenile delinquent and committed to the New York State Agricultural and Industrial School for a period not to exceed three years. Appeal is taken from this adjudication and order of commitment. It is well to note here that upon a finding of juvenile delinquency the possible punishment on the withdrawn charge is commitment to Elmira Reception Center for a similar term. (Family Ct. Act, § 758, subds. [b], [c].)

In denying appellant's motion for a direction regarding the burden of proof the court held that there is no requirement "to establish that the respondent committed the acts alleged in the petition by proof beyond a reasonable doubt but (only) as required by section 744-b by a preponderance of the evidence". Subdivision (b) of section 744 of the Family Court Act, in pertinent part provides that:

> "Any determination at the conclusion of a fact-finding hearing that a respondent did an act or acts must be based on a preponderance of the evidence."

In so holding, the court erroneously deprived appellant of a fundamental right which has now been held by the Supreme Court to be constitutionally protected, requiring the burden of proof to be beyond a reasonable doubt. (Matter of Winship, ___U.S.___ [dec. March 31, 1970.].) Subdivision (b) of section 744 of the Family Court Act, insofar as it requires a quantum of proof by a mere preponderance of the evidence is, therefore, declared unconstitutional.

It is urged that the admission of the acts alleged in the second petition was the result of a bargain made by this 15-year-old boy and, therefore, he may not now disclaim this voluntary "plea". The dissenting Justice has bottomed his conclusion and reasoning on the argument that "appellant's admission of the allegations of the new petition and his commitment should be sustained on the ground that it was sought by him and freely taken as a part of a bargain which was struck for his benefit". We are unable to subscribe to any theory or suggestion that a youth of this age has the capacity to waive or "bargain" away any of his constitutional rights or, indeed, that such a theory could be adopted under the circumstances so glaringly present in this case. Of equally compelling importance, the record clearly shows that neither the second petition nor appellant's admission was considered until after the denial of the last of his several motions for a jury trial. Significantly the first petition, to which appellant's motions were originally addressed, was not dismissed until after the second petition was

acted on. Additionally, we reach the inescapable conclusion that appellant was effectively denied his fundamental right of a hearing under a constitutionally protected right to a jury trial as well as rules requiring that proof of the commission of the charged acts be beyond a reasonable doubt and, therefore, his admission of the acts contained in the substituted petition was extracted in an impermissible manner. (Cf. Nieves v. United States, 280 F. Supp. 994, 1001.)

In the light of all of the described circumstances the admission, then, was not voluntarily made but rather was the result of the denial of his motions for a jury trial, the denial of adjournments prior to his "admission" of the charges and the ruling as to the required burden of proof, all of which effectively constituted instruments of coercion as to his admission of the acts alleged in the second petition. As we view the totality of these proceedings, we conclude that appellant has been denied the essentials of due process and was deprived of these constitutional rights.

The decisions in Matter of Gault (387 U. S. 1) and Duncan v. Louisiana (391 U. S. 145) have, it seems to us, foreclosed the answer to the question regarding his right to a jury trial. In Duncan, the Supreme Court held that the Fourteenth Amendment made applicable to the States the Sixth Amendment right to a jury trial in serious crimes and further (p. 159) that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment", and then further declared that a crime punishable by two years in prison is a "serious crime". Matter of Gault (supra), dealt directly with certain constitutional safeguards of juveniles charged with being delinquents as a result of committing criminal acts. While the question as to the right to a jury trial was not there present, the Supreme Court held that juveniles were entitled to

notice of the issues involved, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against them. It defies the power of reason to interpret the Constitution as allowing these rights to persons charged with being delinquents based on criminal acts, and yet denying them a jury trial, a right which is certainly one of the fundamental aspects of justice in the English-speaking world. Behind the facade of the charge of juvenile delinquency in this case is the serious charge of murder or of attempted murder.

Having determined in Gault that a child must, as a matter of due process, be afforded certain constitutional rights on the ground that the child may "be found to be 'delinquent' and subjected to the loss of his liberty for years", and since he is in a situation which is "comparable in seriousness to a felony prosecution" (p. 36), it follows then that the safeguards available to adults may not be disregarded in a child's case. Hence, there is an inescapable conclusion that a finding of delinquency based on the allegations and facts here presented ought to be made only after the right to a jury trial has been afforded.

In Matter of Hogan v. Rosenberg (24 N Y 2d 207) the court considered the effect of Duncan on certain provisions of the New York City Criminal Court Act and held that section 40 of the Act (authorizing nonjury trials in misdemeanor cases) was constitutional but directed that reformatory terms of up to four years could not be imposed on young offenders between 16 and 21 and, thus, effectively held that they could be sentenced to a maximum of one year. We may, therefore, conclude that the court designated as "serious", a charge which could result in confinement for more than one year.

We have recently held in People v. Sawyer (33 A D 2d 242) that one charged with being a youthful offender is effectively denied due process when he is required to consent to a nonjury trial as a prerequisite for treatment as a youthful offender. We there determined, as other have held

(People v. Michael A. C. [Anonymous], 32 A D 2d 554; People v. Jerome C. [Anonymous], 32 A D 2d 840; Matter of Saunders v. Lupiano, 30 A D 2d 803), that such a requirement is unconstitutional. (See, also, People v. Lawrence S. [Anonymous], 33 A D 2d 775; People v. Lancaster, 34 A D 2d ___.)

A lesser standard of justice than that permitted to adults and youthful offenders may not be justified on the theory that juvenile delinquency proceedings are designed to save a child. Objectivity requires us also to recognize that saving a human being is likewise the end result sought via the rehabilitation of adults and youthful offenders.

It has been effectively stated that "any commitment — whether 'civil' or 'criminal', whether assertedly for 'punitive' or 'rehabilitative' purposes — involves a grave interference with personal liberty". (Report of Joint Legis. Committee on Court Reorganization, Jan. 30, 1962, p. 8.) With further reference to this subject we point out that at the hearing in the case at bar, on March 5, 1969 the court posed the rhetorical question "didn't the Duncan case and the Gault case both hold in substance you shall not elevate form over substance and regardless of what you call a place of incarceration whether you call it a school or rehabilitation center it's still essentially a prison?" We are constrained to agree with the obvious affirmative answer.

Uppermost in our mind must be the realization that an adjudication of delinquency, as here, can result in confinement in a State training school for several years. The impact of this was dramatically pointed up by the Supreme Court in Gault (387 U.S. 1, 27, supra) when it stated that,

> "ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence — and of limited practical

> meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with whitewashed walls, regimented routine and institutional hours***" [Holmes' Appeal, 379 Pa. 599, 616, Musmanno, J., dissenting.]. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide."

The "civil-criminal" distinction between adult crimes and delinquency cases is nonexistent insofar as a child's constitutional safeguards are concerned. This is particularly so where a possible result of the proceedings is incarceration for a substantial period of time, and as the court added in Gault (387 U.S. 1, 30), "we do hold that the [juvenile delinquency] hearing must measure up to the essentials of due process and fair treatment."

In its reversal (predicated upon the use of unlawfully received confessions) the court set aside a finding of deliquency in Matter of Gregory W. (19 N Y 2d 55) and adopted the rationale of the dissenters in the Appellate Division (26 A D2d 695, 697) wherein they had held that an alleged juvenile delinquent is entitled to "the same constitutional requirements of due process without regard to the nature of the proceeding, the standards of proof, or the punishment to follow, where the liberty of an individual is in the balance (cf. Matter of Alaimo, 16 A D 2d 814)" and added that, "a juvenile charged in Family Court with the commission of acts amounting to a crime if committed by an adult should surely enjoy the same constitutional safeguards as would

the adult charged in a criminal prosecution (cf. Matter of Contreras, 109 Cal. App. 2d 787; Ex parte Osborne, 127 Tex. Cr. R. 136; State v. Franklin, 202 La. 439; Matter of Gault, 99 Ariz. 181)."

Following its decision in Gault the Supreme Court was presented with the question of a juvenile's right to a jury trial in DeBacker v. Brainard (396 U.S. 28). By a divided court, the majority held it inappropriate to consider the question since the case under review antedated Duncan v. Louisiana (391 U.S. 145, supra) which had been held to have only prospective application in DeStefano v. Woods (392 U.S. 631). The dissenters preferred to meet head-on the fundamental questions posed, and reached the merits, holding that the youth involved, charged with forgery, was entitled to a jury trial in a juvenile delinquency proceeding. It is of interest to note that 4 of the 7 members of the Nebraska Supreme Court from which the appeal was taken, determined that the State statute providing for juvenile delinquency hearings without a jury, was unconstitutional, but that State's Constitution requires the concurrence of 5 Judges before an act can be held unconstitutional.

We can find no constitutionally sufficient reason to deprive a juvenile of a jury trial when he is faced with the possibility of incarceration of more than one year because of his criminal acts. Whenever there is a trial or hearing involving a criminal offense of this nature, whether in conventional terms or in the language of delinquency, all of the procedural requirements and safeguards of the Constitution and Bill of Rights should be provided. Infancy should not invoke a forfeiture of any of these rights nor should the penalty of being a youth be the deprivation of due process and fairness to the end that the constitutional right here involved be withdrawn from children charged with having committed serious crimes. Since, as in Matter of Gault (387 U.S. 1, 49), it was determined that "juvenile proceedings to detemine 'delinquency', which may lead to

commitment to a state institution, must be regarded as 'criminal' " for purposes of the constitutional safeguards there involved, we cannot place such a proceeding in a different category insofar as it involves the otherwise important constitutional safeguard of a trial by jury.

In holding that a jury trial must be afforded to one charged with juvenile delinquency involving a serious crime as defined by Duncan v. Louisiana (391 U.S. 145, supra) and Matter of Hogan v. Rosenberg (24 N Y 2d 207, supra) we were mindful of the requirement of the privacy of such proceedings. The presence of a jury would not violate the required privacy and, as aptly stated by Mr. Justice Bastow in People v. Sawyer (33 A D 2d 242, 245, supra) "If there is a conflict, then the State statute must yield to the mandate that 'The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.' (Duncan v. Louisiana, 391 U.S. 145, 156, supra.)"

Neither should we be concerned with the frequency of such requests for jury trials. The existence of a right is not conditioned on the number of occasions that it will be put to use or the persons who will use it. Rather, the right is established by our system of government to protect the people to whom it is made available.

By our declaration that a jury trial should be afforded to a youth charged with being a juvenile delinquent based on an act which if committed by an adult, would constitute a crime, we limit our holding to those charges involving serious crimes as defined by Duncan v. Louisiana (supra) and Matter of Hogan v. Rosenberg (supra). We do not suggest that those provisions of the Family Court Act dealing with neglect and delinquency cases not involving a crime or acts of a criminal nature, require a jury trial. (Cf. People v. Fitzgerald, 244 N.Y. 307, 312.)

Our resolution of the basic and fundamental issues presented, renders academic the other questions raised.

The order should be reversed and the proceeding remitted to the Onondaga Family Court for further proceedings not inconsistent with this opinion.

---

## OPINION OF HENRY, J. (dissenting).

HENRY, J. (dissenting).

When appellant appeared with his attorney in Family Court on March 13, 1969 to answer the petition dated January 29, 1969, charging him with acts which if committed by an adult would be in violation of section 125.25 of the Penal Law constituting the crime of murder, the court, in response to a question asked by appellant's attorney, correctly stated that on the allegations of the petition appellant could be committed to Elmira Reception Center for a period up to three years. Appellant's attorney thereupon requested an adjournment for the purpose of having a discussion with the court and the County Attorney. After the discussion the County Attorney stated:

> "it is the recommendation of our office that a new petition be filed and this petition would be an allegation that Daniel Richard * * * performed an act which if performed by an adult would be a Violation of Section 120.25 of the Penal Law of the State of New York. (reckless endangerment) It is further our recommendation that upon the appropriate arraignment of this Court and upon Respondent being represented by counsel and by being properly advised by the Court, if he admits the allegations of the new petition that at that time I would move for dismissal of the old petition".

Opinion of Henry, J. (dissenting).

The court received the new petition. It was read to appellant. The court then stated to appellant and his attorney "you can admit or deny the petition." Appellant's attorney said, "He admits the petition". The court asked appellant, "Do you admit the allegations of the petition?" and appellant answered, "Yes, your Honor". The record shows, and appellant does not claim otherwise, that appellant's answer to the new petition was voluntarily and understandingly made. He did not then, nor does he now, ask to withdraw or change his answer admitting the allegations. The order appealed from committed appellant to the New York State Agricultural and Industrial School at Industry for an indefinite period not to exceed three years.

The original petition charged acts which if committed by an adult would constitute a Class A felony (Penal Law, § 125.25). Upon an adjudication thereunder commitment could be to Elmira Reception Center (Family Ct. Act, § 758, subd. [b]), whereas under the new petition appellant could not be so committed. Appellant's admission of the allegations of the new petition and his commitment should be sustained on the ground that it was sought by him and freely taken as part of a bargain which was struck for his benefit. (People v. Foster, 19 N Y 2d 150, 154.) Reversal is not required by our decision in People v. Sawyer (33 A D 2d 242), where we held that a youthful offender was entitled to a trial by jury notwithstanding his written consent to be tried without a jury, because his consent was extracted in an impermissible manner. He was required to consent to a nonjury trial as a prerequisite to consideration for adjudication as a youthful offender. In the case at bar no objection was made to the new petition. The answer admitting its allegations was voluntarily made and understandingly made, and the allegations being admitted there was no issue to be tried.

The order should be affirmed.

Decision of Barth, J., 3-10-69.

GOLDMAN, P.J., WITMER and MOULE, JJ., concur with GABRIELLI, J.; HENRY, J., dissents and votes to affirm in opinion.

Motion to dismiss appeal denied. Order reversed on the law and facts and matter remitted to Onondaga County Family Court for further proceedings not inconsistent with the opinion by GABRIELLI, J.

---

## DECISION OF BARTH, J., 3-10-69.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ONONDAGA

IN THE MATTER
OF
DANIEL RICHARD DAVOLI
A Person alleged to be a Juvenile Delinquent

Docket No. D-55-69 Respondent.

The above proceeding was initiated by a petition verified the 29th day of January, 1969. Such petition sets forth that:

"5. (Upon information and belief), on or about January 24, 1969, on or about 9:30 P. M. at 21 Brockway Lane, Town of Dewitt, County of Onondaga, said Respondent (set forth a concise statement of alleged delinquent acts) Daniel Richard Davoli, wilfully and unlawfully with intent to cause the death of another person, he caused the death of such person or of a third person, to-wit: he did shoot and kill one Joseph C. Davoli by placing a 12-guage Ithico Featherweight Model 37, Serial #986138 shotgun to the head of Joseph C. Davoli and fired a 12-guage deer slug into Davoli's head; which acts if committed by an adult would be in

violation of Section 125.25 of the Penal Law of the State of New York."

The age of the Respondent as having been 15 years at the time the events alleged in the petition and as alleged in the petition was established at a hearing had before Hon. Peter P. Kolakowski of this Court on January 27, 1969.

The Respondent now moves for a jury trial, urging that to deny him a jury trial would be to deny him due process of the laws.

Respondent's attorney argues that the Supreme Court established in Matter of Gault, 387 U. S. 1, that persons charged with Juvenile Delinquency were entitled to due process of law under the Sixth and Fourteenth amendments of the Constitution of the United States; that if the infant can be subject to a loss of liberty for a matter of years, it is comparative in seriousness to a felony prosecution; that in this case if the Respondent after a fact finding hearing is found to be a Juvenile Delinquent, he could be committed to Elmira Reception Center for three years and that thus, under the decision in Duncan v. State of Louisiana, 391 U. S. 145, where the Supreme Court held that where imprisonment could be for two years, the Sixth and Fourteenth Amendments required the States to grant jury trials. Respondent further relies on Matter of Hogan v. Rosenberg, 58 Misc. 2d 585, which upheld the grant of jury trials in the Criminal Court of the City of New York.

Conversely, the County Attorney opposing the Respondent's motion, asserts that proceedings in the Family Court with respect to a petition alleging juvenile delinquency are not criminal in nature; that the juvenile avoids the stigma of a criminal trial, a criminal conviction, a criminal record and its consequences; that the juvenile does not receive punishment but rehabilitation; that the purpose of the proceeding is to determine whether the juvenile requires the assistance of the Family Court in preparing him to be

a benefit to society. He further claims that the decision in Gault (Supra) insofar as it guarantees due process in juvenile cases must be limited to those elements of due process specifically reviewed and ruled upon by the Court in that case of which the right to a jury trial was not one.

Certainly, the acts alleged in the petition are most serious in nature. Such that if upon conviction, an adult would be subject to a penalty of life imprisonment; such that if prior to September 1, 1967, the acts had been alleged to have been committed by a person fifteen years of age, this Court would not have had jurisdiction except by an order removing the proceeding to this Court, and finally such that if alleged to have been committed by this Respondent on February 1, 1969, rather than on January 24, 1969, he would be subject to a criminal prosecution and if convicted, would be subject to a penalty of life imprisonment. (Family Court Act, Sec. 715, repealed September 1, 1967).

The Respondent, however, is not subject to criminal prosecution on the acts alleged in the petition and in the event upon trial such acts should be established to have been committed by him, he may merely be adjudicated a Juvenile Delinquent, (Family Court Act, Sec. 712) and then subject only to those measures provided by the Legislature in implementation of Section 13 of Article 6 of the New York State Constitution which confers upon the Family Court jurisdiction of proceedings for:

> "(1) the protection, treatment, correction and committment of those minors who are in need of the exercise of the authority of the Court because of circumstances of neglect, delinquency or dependency, as the legislature may determine."

It is true, as argued by counsel for Respondent, that the Court upon a determination of juvenile delinquency after a fact finding hearing in this case, would have authority after a dispositional hearing to commit the Respondent

to Elmira Reception Center for a period of three years. (Family Court Act, Section 758-b).

It is also true that even upon adjudication as a delinquent, the infant continues to be cloaked in the protective mantle of the Act. The adjudication is not a "conviction" nor may he be "dominated a criminal by reason of such adjudication" Family Court Act, Section 781. Further, his right to hold public office and of receiving any license granted by public authority is guaranteed by Section 782 of the Act. Finally, Sections 783 and 784 insure him against the use in other Courts of the records of this Court as evidence against him and the public inspection of such records.

It is contended that the Respondent, in a proceeding under Article 7 of the Family Court Act, unlike a youthful offender, has no choice as to the manner in which he may be proceeded against.

But, it appears to this Court, that in depriving a person under 16 years of age of a choice between a proceeding, the result of which can only be an adjudication of delinquency and insuring to the infant all of the benefits and protections of the Family Court Act and a criminal prosecution with all of the disabilities which might accrue upon a conviction in such a prosecution, the legislature may only be held to have conferred a benefit on the infant.

Justice Starkey, in his decision in the case of The People v. Larry K. and Samuel K., 58 Misc. 2nd 526, states with respect to Duncan v. Louisiana, 391 U. S. 145, at page 529:

> "The decision in the Duncan case is a landmark decision. However, the Court refers to criminal cases and criminal prosecutions, but the mandate that all defendants in serious criminal prosecutions have a right to be tried by a jury does not apply to youthful offenders proceedings, which are not criminal prosecutions nor do they result in criminal disability."

This Court is in agreement with Justice Starkey on that

point and is of the opinion that even greater reason appears for not applying the holding in the Duncan case to proceedings under Article 7 of the Family Court Act of the State of New York. The arguments against applying the rule in the Duncan case to youthful offender proceedings, and in my opinion, juvenile proceedings, under the Family Court Act and for not extending the holding of the United States Supreme Court in Matter of Gault, 387 U. S. 1 to such youthful offender proceedings, and in my opinion juvenile proceedings are well stated in the Larry K. case (supra) and need not be here again set forth in detail.

Suffice it to say, that it is my opinion that the effect of the Gault case is limited to the specific matters reviewed by the Court in that case as appears from the opinions of the learned Justices filed therein, one of which was not the right of a juvenile to trial by jury.

I therefore conclude that under present law, as I conceive it to be, a juvenile is not entitled to a jury in a fact finding hearing under Article 7 of the Family Court Act.

Accordingly, Respondent's motion for a jury upon the fact finding hearing in this proceeding is denied.

Dated: March 10, 1969.

RAYMOND J. BARTH
JUDGE OF FAMILY COURT

## DECISION OF BARTH, J., 3-11-69.

(SAME TITLE).

BARTH, RAYMOND J.
Judge of Family Court

DECISION

The Respondent, by his attorneys, has moved the Court for an order requiring (1) "that the County Attorney, County of Onondaga, serve upon the attorneys for Respondent, pursuant to Section 813-f of the Code of Criminal Procedure, a written notice of intention to offer a confession or admission in evidence upon the trial of the Respondent, if such is their intention," and (2) "that the burden of proof by which the County Attorney, County of Onondaga, will have to establish that the Respondent committed the acts stated in the Petition, is to be proof beyond a reasonable doubt," and for such other relief as to this Court may seem just and proper.

On argument, attorney for respondent contended that even if it were determined that the Code of Criminal Procedure had no application to proceedings in Family Court, that Respondent would none the less be entitled to a Huntley hearing prior to the fact finding hearing with respect to any confession or admission of the Respondent which the County Attorney might seek to introduce at the fact finding hearing and further that because the fact finding hearing will be had before a Judge of Family Court without a jury, that the Respondent is entitled to have such Huntley hearing before a Judge of the Family Court other than the Judge who will conduct the fact finding hearing. In support of this petition, respondent's attorney cites Matter of Gault 387 U. S. 1.

The County Attorney cites Matter of Williams 49 Misc. 2nd (1966) 154 for the proposition that the Code of Criminal Procedure is not applicable in Family Court proceedings and Matter of Samuel W., an unpublished and unrevised and

uncorrected opinion of the Court of Appeals for the proposition that the burden of proof required on a fact finding hearing in Family Court is not required to be beyond a reasonable doubt but is required to be, as is set forth in Section 744-b of the Act as follows:

> "b- Any determination at the conclusion of a fact finding hearing that a Respondent did an act or acts must be based on a preponderance of the evidence. For this purpose, an uncorroborated confession made out of Court by a Respondent is not sufficient."

The Court holds that the Code of Criminal Procedure does not apply to proceedings in Family Court except as certain provisions of the Code are made applicable by Sections 721 and 722 of the Family Court Act and, therefore, that the County Attorney is not required to serve upon the attorneys for Respondent a written notice of intention to offer a confession or admission in evidence upon the fact finding hearing in this case. Code of Criminal Procedure, Section 11; Matter of Williams (supra).

The Court further holds that Matter of Gault (supra) does not require the Court to grant the Respondent a Huntley hearing in accordance with the procedures for such hearing established in People v. Huntley 15 N. Y. 2nd 72. In Matter of Gault, the Court citing its opinion in Kent v. United States, 383 U. S. 541, said:

> "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual admistrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."

Certainly the Respondent is entitled to have a determination as to the voluntariness and admissability of any confession or admission offered by the County Attorney upon

the fact finding hearing. Such determination can be made at the time such confession or admission is offered at the fact finding hearing without prejudice to the rights of the Respondent and any determination made by the Court at that time is reviewable by the Appellate Division upon an appeal from the determination of the Court at the end of the fact finding hearing.

The Court is of the opinion and so holds that Section 744-b of the Family Court Act is not invalidated by the holding in Matter of Gault (supra), and that the County Attorney, upon a fact finding hearing is not required to establish that the Respondent committed the acts alleged in the petition by proof beyond a reasonable doubt but as required by Section 744-b by a preponderance of the evidence.

Accordingly, Respondent's motion is in all respects denied.

Dated: March 11, 1969.

RAYMOND J. BARTH
JUDGE OF FAMILY COURT

# APPENDIX B

# AFFIDAVIT OF RONALD J. CROWLEY.

SUPREME COURT OF THE UNITED STATES

In the Matter of

DANIEL RICHARD D., a Person Alleged to be a Juvenile Delinquent.

DANIEL RICHARD D.,

Appellant,

-v-

COUNTY OF ONONDAGA,

Appellee.

STATE OF NEW YORK )
COUNTY OF ONONDAGA ) SS.:
CITY OF SYRACUSE )

RONALD J. CROWLEY, Esq., being duly sworn, deposes and states:

1. That he is an Assistant County Attorney for the County of Onondaga, Appellee herein, and is personally familiar with the facts and circumstances surrounding the above-captioned matter and with all the proceedings heretofore had herein.

2. That your deponent was personally responsible for the preparation of the brief in the above-captioned matter which was submitted to the State of New York Court of Appeals.

3. That subsequent to the Court of Appeals decision on July 2, 1970, your deponent had a series of conversations with Mr. Dennis G. O'Hara, Esq., attorney for the Appellant, Daniel Richard D., that said conversations extended over a period of time from July of 1970 to the present date.

4. That as early as July of 1970, Mr. O'Hara advised your deponent that it was his understanding that he had a ninety (90) day period within which to file his Notice of

Affidavit of Ronald J. Crowley.

Appeal from the Order of the Court of Appeals and an additional sixty (60) day period thereafter for docketing of this appeal in the Supreme Court of the United States.

5. That your deponent's understanding was in accord with Mr. O'Hara and your deponent assumed that Appellant had until December 2, 1970, within which to docket this matter.

6. That your deponent has discussed this case with the County Attorney for the County of Onondaga and it is the position of the Appellee herein that the constitutional issues which are raised in this matter should be brought before the Supreme Court of the United States for decision; that therefore your deponent has no objection to this Court's permitting a late docketing of this matter.

7. That the Appellee's decision to concur in the request of Appellant's attorney for allowance of the late docketing of this matter is based partly on the fact that the interests of a juvenile are involved in this proceeding and your deponent does not feel that said juvenile should be punished because of the inadvertent error of his counsel.

Ronald J. Crowley
RONALD J. CROWLEY

(Sworn to October 26, 1970).

# AFFIDAVIT OF DENNIS G. O'HARA.

(SAME TITLE).

STATE OF NEW YORK )
COUNTY OF ONONDAGA ) SS.:
CITY OF SYRACUSE )

DENNIS G. O'HARA, being duly sworn, deposes and states:

1. That he is an attorney at law duly licensed to practice in the State of New York and is associated with the firm of Mackenzie, Smith, Lewis, Michell & Hughes, attorneys for the Appellant herein.

2. That your deponent was responsible for the defense of the above-captioned matter during the entire proceedings heretofore had herein, including the preparation of briefs and the delivery of oral arguments in both the Appellate Division of the Supreme Court, Fourth Department, and the State of New York Court of Appeals.

3. That shortly after the decision of the Court of Appeals was handed down on July 2, 1970, your deponent discussed this case with Appellant's family and with other attorneys in this office and a decision was reached to appeal the same to the Supreme Court of the United States.

4. That shortly thereafter, on or about July 20, 1970, a Notice of Appeal was filed with the Clerk of the State of New York Court of Appeals and copies of the same were delivered to the County Attorney for the County of Onondaga and the Clerk of Onondaga County Family Court.

5. That at the time your deponent filed the Notice of Appeal he examined a copy of the Rules of the Supreme Court of the United States which indicated that he had ninety (90) days within which to file the Notice of Appeal and an additional sixty (60) days thereafter within which to docket the case.

6. That your deponent was not aware at that time